INDEX

	Page
Statement	1
Argument	5
Conclusion	12

CITATIONS

Cases:

Alabama Independent Service Station Ass'n, Inc. v. *Shell Petroleum Corp.*, 28 F. Supp. 386	7
Bell v. *Preferred Life Assurance Society*, 131 F. 2d 516, reversed, 320 U.S. 238	7
Columbia Broadcasting System, Inc. v. *United States*, 316 U.S. 407	6
Eastern Express, Inc. v. *United States*, 369 U.S. 37, affirming 198 F. Supp. 256	5, 7, 8
Farmers Co-op. Oil Co. v. *Socony-Vacuum Oil Co.*, 133 F. 2d 101	6
Freight Forwarding Investigation, 229 I.C.C. 201	9
Forwarder Volume Commodity Rates, Chicago and New York, 310 I.C.C. 199, affirmed, *Eastern Express, Inc.* v. *United States*, 198 F. Supp. 256, affirmed, *per curiam*, 369 U.S. 37	5, 9, 11
Hickey v. *Illinois Central Railroad*, 278 F. 2d 529, certiorari denied, 364 U.S. 908	7
Institute of Scrap Iron & Steel, Inc. v. *United States*, No. 672-54 (D.D.C., May 26, 1954)	6
McLean Trucking Co. v. *United States*, 321 U.S. 67	11
National Fisheries Institute, Inc. v. *United States*, No. 5242-51 (D.D.C., May 13, 1952)	6

Cases Continued

	Page
National Hairdressers & Cosmetologists' Ass'n v. Philad Co., 41 Supp. 701, affirmed, 129 F. 2d 1020	6
Radio Corp. v. United States, 341 U.S. 412	9
Schaffer Transportation Co. v. United States, 355 U.S. 83	10, 11

Statutes:

Interstate Commerce Act, 49 U.S.C. 1, *et seq.*:	
National Transportation Policy, 49 U.S.C. preceding 1	4, 5, 13, 14
Sec. 15a, 49 U.S.C. 15a	10
Part IV, 49 U.S.C. 1001, *et seq.*	2
Sec. 402(a)(5), 49 U.S.C. 1002(a)(5)	3, 7
Sec. 404(b), 49 U.S.C. 1004(b)	8
Sec. 415, 49 U.S.C. 1015	8
28 U.S.C. 1336, 2321-2325	5, 6

Miscellaneous:

A.T.A. Motor Carrier Directory (1962)	6
Federal Rules of Civil Procedure:	
Rule 23(a)	6
Hearings on S. Res. No. 146 Before a Subcommittee of the Senate Interstate Commerce Committee, 76th Cong., 3d Sess.	9
3 Moore, *Federal Practice* (2d ed. 1948)	7
Motor Freight Directory (New York ed., 1962)	6

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 479

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., AND ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court [1] which dismissed appellants' complaint seeking to set aside an order of the

[1] The final judgment is not printed in appellants' Jurisdictional Statement. The opinion of the district court is printed at pp. 1a–10a therein.

Interstate Commerce Commission. Appellants are incorporated associations of motor common carriers (J.S. 2a). The order of the Commission which they sought to enjoin authorized Western Freight Association, a freight forwarder, to reduce its rates for shipments of 20,000–30,000-pound minimum weight (J.S. 1a).

Freight forwarders are regulated by the Interstate Commerce Commission under Part IV of the Interstate Commerce Act, 49 U.S.C. 1001, *et seq.* Typically, they assemble and consolidate separate consignments of freight and tender them as a single unit via motor, rail or water carrier to a destination at which they separate the individual consignments and distribute them to the respective consignees. Forwarders are thus shippers in relation to the line-haul common carriers whom they patronize. They pay normal rates but, by reason of the discount for volume shipments allowed in the line-haul carriers' tariffs, pay less than the total their customers would have to pay for separate shipments of the goods. Charging rates somewhat lower than those which the line-haul carriers would charge for separate shipments, the forwarders derive their profit from the difference between those rates and the still lower volume rates which they themselves pay.

By tariff schedules filed with the Commission to become effective on October 26, 1958, Western Freight Association published reductions in numerous commodity rates based upon weight minima of 20,000–30,000 pounds (J.S. 11a). The reductions were initiated to reflect the cost savings inherent in the bill-

ing of a single large shipment compared with the billing of multiple shipments aggregating the same weight, as well as the greater ease provided by large shipments in the loading of heavier cars (J.S. 14a). Upon the protest of appellants, a few of whose members compete with Western for the traffic covered by the reductions (Pl. Reply Br. in the district court, p. 2), the Commission suspended the proposed schedules (J.S. 20a). Appellants charged that under Section 402(a)(5) of the Act, 49 U.S.C. 1002(a)(5), forwarders are required to operate by assembling and consolidating so-called small shipments for line-haul as a single unit and by deconsolidating and distributing the separate consignments at destination, while under the proposed rates the forwarders were enabled unlawfully to accept full truckload or volume shipments without performing those functions (J.S. 21a–22a). They further charged that certain car service rules adopted by the railroads performing the line-haul deprive the service rendered under the proposed reductions of the characteristics of forwarder service (J.S. 22a). Under these rules, the railroad may provide two or three smaller refrigerated cars to a forwarder in lieu of a single boxcar into which the consolidated shipments are normally loaded, and may provide separate cars spotted for loading or unloading parts of a single consolidated shipment at different points when the consignor or consignee of the goods chooses to load or unload them himself (J.S. 22a–23a). Finally, appellants argued that the diversion of traffic which would allegedly result from the proposed rate reductions made the reductions a destructive competitive prac-

tice in violation of the National Transportation Policy, 49 U.S.C. preceding 1 (see J.S. 22a).

On May 18, 1959, after an evidentiary hearing, Division 3 of the Commission issued a report and order in which it held the rates lawful and ordered the proceedings discontinued (J.S. 10a–16a). It found that the rates as reduced would yield "substantially more than full cost plus a reasonable profit" and therefore did not constitute a destructive competitive practice (J.S. 15a). The rate suspensions expired on May 22, 1959, and the proposed reductions became effective (J.S. 20a). On September 24, 1959, the full Commission denied reconsideration (J.S. 17a).

Appellants filed their complaint in the district court on June 3, 1960. Three weeks later, on June 23, the Commission *sua sponte* reopened the proceedings for reconsideration (J.S. 18a). On December 19, 1960, it issued its report on reconsideration (J.S. 19a–24a). The Commission adopted the findings with respect to costs and revenues contained in the prior report (J.S. 21a) and held further (1) that nothing in the Interstate Commerce Act prohibits a forwarder from handling volume shipments at reduced rates if it can handle them more economically than several smaller shipments (J.S. 22a); (2) that "normally" the service provided by the railroads would not be applied to obviate the necessity of consolidation and deconsolidation by the forwarder, so that operations under the rates as reduced would be those "of a freight forwarder as defined in the act" (J.S. 23a); and (3) that the rates were fully compensatory and not a destructive competitive practice (*ibid*). In holding that forwarders

were entitled to establish reduced rates for volume shipments, the Commission relied (J.S. 21a) upon its earlier decision in *Forwarder Volume Commodity Rates, Chicago and New York*, 310 I.C.C. 199, affirmed, *Eastern Express, Inc.* v. *United States*, 198 F. Supp. 256 (S.D. Ind.), affirmed *per curiam*, 369 U.S. 37.

The district court entered its judgment dismissing the complaint on June 7, 1962. It found that appellants, who did not themselves compete with freight forwarders for the carriage of goods but were merely associations of motor carriers, lacked standing to bring an equity suit against the Commission's order in the district court under the Urgent Deficiencies Act, 28 U.S.C. 1336, 2321–2325 (J.S. 2a–4a); that the evidence showed that the railroad car service rules would cause only occasional departures from the normal process of consolidation and deconsolidation under the rates at issue (J.S. 8a); that the statute does not require forwarders to perform the functions of consolidation and deconsolidation on those infrequent occasions when for the convenience of the railroads or the forwarders' customers those functions are neither necessary nor requested (J.S. 8a–9a); and that the National Transportation Policy is "well served" by the reduction of rates to reflect lowered costs when, as here, no destructive competitive effects ensue (J.S. 9a).

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

1. The district court properly held (Pet. App. 2a–4a) that appellants (which are trade associations of

carriers[1] failed to assert an interest in the Commission's order sufficient to support a suit in equity to enjoin the order. They are not shippers being forced to pay unreasonable or unlawful charges, nor are they competitors whose ability to compete effectively has been curtailed. Indeed, three-judge district courts have in the past dismissed, for lack of standing, complaints against Commission orders brought by trade associations of interested parties. See *Institute of Scrap Iron & Steel, Inc. v. United States*, No. 672–54 (D.D.C., May 26, 1954); *National Fisheries Institute, Inc. v. United States*, No. 524–51 (D.D.C., May 13, 1952).

Appellants do not gain standing to sue as representatives of their carrier members. (see J.S. 8–10, 12–13). This is not a class action authorized by Rule 23(a)(3) of the Federal Rules of Civil Procedure, on which appellants rely (J.S. 12 & n. 3). An association composed of persons, some of whom have an interest, cannot maintain a class action to assert the rights of its members. *Farmers Co-op. Oil Co. v. Socony Vacuum Oil Co.*, 133 F. 2d 101, 103–104 (C.A. 8); *National Hairdressers' & Cosmetologists' Ass'n*

---

[1] Standing to challenge orders of the Interstate Commerce Commission, unlike those of most other administrative agencies, is governed by no special statute. Review may be had only in ordinary suits in equity in the district courts. 28 U.S.C. 1336; 49 U.S.C. 17(9); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 415.

While the record is silent on the point, it appears that only two or three of appellants' members have authority to operate directly between the areas involved in the challenged order. The A.T.A. Motor Carrier Directory (1962); Motor Freight Directory (New York ed., 1962), pp. 55–59.

v. *Philad Co.*, 41 F. Supp. 701, 708 (D. Del.), affirmed, 129 F. 2d 1020 (C.A. 3); *Alabama Independent Service Station Ass'n, Inc.* v. *Shell Petroleum Corp.*, 28 F. Supp. 386, 390 (N.D. Ala.). Nor have appellants been "expressly authorized" to bring the present equity suit (see J.S. 12). The general powers conferred by their members do not give them standing as attorneys in fact entitled to sue under Rule 17(a). See 3 Moore, *Federal Practice*, p. 1351 (2d ed., 1948); *Hickey* v. *Illinois Central Railroad*, 278 F. 2d 529, 532 (C.A. 7), certiorari denied, 364 U.S. 908; *Bell* v. *Preferred Life Assurance Society*, 131 F. 2d 516, 518 (C.A. 5), reversed on other grounds, 320 U.S. 238.

While we believe that the district court correctly held that appellants lack standing to bring this equity action, we recognize that this precise issue has not been decided by this Court. This consideration notwithstanding, we believe that the judgment should be summarily affirmed. The court below went on to consider the merits, and it was plainly correct, as we shall urge, in concluding that appellants' case was insubstantial, especially in light of *Eastern Express, Inc.* v. *United States*, 369 U.S. 37, affirming 198 F. Supp. 256 (S.D. Ind).

2. Appellants argue (J.S. 18-25) that the volume shipments covered by the assailed rates are assembled by shippers and broken into smaller lots by consignees, so that forwarders will not perform the functions described in Section 402(a)(5) of the Interstate Commerce Act, 49 U.S.C. 1002(a)(5). This, they contend, violates the statute which requires forwarders to offer and actually to perform all such functions

with respect to every shipment (Pet. 21, 24; see Pet. App. 9a). But this Court only last Term held to the contrary and affirmed the right of freight forwarders to publish special reduced rates for handling volume shipments in a manner similar to that at issue here. *Eastern Express, Inc.* v. *United States*, 369 U.S. 37, affirming 198 F. Supp. 256 (S.D. Ind.).

The other characteristics of the challenged rates to which appellants object are irrelevant to the legality of the rates under Section 402(a)(5). In allowing a reduced rate when a shipper or consignee prefers to load or unload, the forwarder merely passes on to the consumer of transportation services the cost savings realized. The option to dispense with these elements of the service lies with the shipper or consignee, not with the forwarder, who must perform them if requested to do so. The reductions granted when those elements are performed by the shipper or consignee prevent violation of the statutory prohibitions against discrimination and the granting of allowances not contained in filed tariffs which would result from the performance of a lesser and a greater service at the same rate. Section 404(b), 49 U.S.C. 1004(b); Section 415, 49 U.S.C. 1015. The district court correctly held that "the freight forwarder has appropriately performed whatever his break-bulk and distribution functions may be when he has made a shipment available to a consignee at the destination terminal and, at consignee's option and request, relinquished control over the shipment to the consignee to do with it as the latter sees fit under the contract" (J.S. 9a).

Similarly, the operation of railroad car service rules over which the forwarders have no control, and which only occasionally will obviate the necessity for consolidation and deconsolidation by the forwarder, cannot affect the legality of the forwarder rates themselves. The statute requires only that these functions be performed in the "ordinary and usual course" of forwarder operations. The statutory requirement is met when the forwarder holds itself out to perform these functions and in fact normally performs them. Here the district court found that "the occasional departure from this norm of actual consolidation and distribution is not so seriously nor so frequently at variance with the literal language of the Act as to outweigh the benefit to the shipping public" provided by the challenged rates (J.S. 8a). Moreover, the impact of the railroad rules upon forwarder operations was well known to Congress when it enacted the statute regulating the forwarder industry. See *Freight Forwarding Investigation*, 229 I.C.C. 201, 226, 241-243; Hearings on S. Res. No. 146 Before a Subcommittee of the Senate Interstate Commerce Committee, 76th Cong., 3d Sess., pp. 32, 341. The district court's affirmance of the findings of the Commission with respect to the operation of the car service rules does not warrant review by this Court (*Radio Corp. v. United States*, 341 U.S. 412, 420), and the interpretation of the statute by the Commission and the Court below was plainly correct.

3. Appellants cannot prevail in their attempt to overturn the Commission's evaluation, on the record

before it, of the bearing of the National Transportation Policy on the rates in issue. There is no specific statutory impediment to the establishment of these forwarder rates. Rather, the National Transportation Policy establishes the public interest in making available the competitive services of different transportation agencies. *Schaffer Transportation Co. v. United States*, 355 U.S. 83. Nor is there any question of encroachment upon any "inherent advantages" of appellants' members which the National Transportation Policy seeks to protect. First, this is in no sense a case of a higher-cost transportation agency undercutting the rates of a lower-cost agency. Appellants have never discussed costs, nor have they challenged the Commission's finding that the assailed rates are fully compensatory. Second, appellants have never attempted to prove that these forwarder rates will infringe any inherent advantage of superior service which their motor carrier members may possess. Indeed, there was no attempt by appellants to prove that any such inherent advantages even exist.

It is appellants' position, and not the Commission's order, which contravenes the National Transportation Policy. The policy directs the Commission to foster "economical and efficient service," and cannot be deemed to require the forwarders to maintain rates at an artificially high level merely to protect the traffic of the motor carriers from fair and non-destructive competition, thereby depriving the public of forwarder service at competitive rates. See Section 15a(3) of the Act, 49 U.S.C. 15a(3). As previously noted, the Commission expressly concluded

(J.S. 23a), "there is no basis on this record for finding that [the assailed forwarder rates] constitute a destructive competitive practice," a conclusion with which the district court agreed (J.S. 9a). Moreover, the implementation of the National Transportation Policy is a matter uniquely for the Commission, and when, as the district court found to be the case here (J.S. 7a–10a), the agency's findings are both rational and supported by substantial evidence, appellants may not complain that they would prefer the matter to be decided more to their own advantage. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87–88; *Schaffer Transportation Co.* v. *United States, supra*, 355 U.S. at 92.[4]

---

[4] The dissenting opinion of Commissioner Walrath upon which appellants rely (J.S. 28) for their National Transportation Policy argument was rejected by the Commission in an order which was affirmed by this Court only last Term. *Forwarder Volume Commodity Rates, Chicago and New York*, 340 I.C.C. 199, affirmed, *Eastern Express, Inc.* v. *United States, supra*.

CONCLUSION

For these reasons, the judgment should be affirmed.
Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
ROBERT B. HUMMEL,
JOEL E. HOFFMAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
FRITZ R. KAHN,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

NOVEMBER 1962.